1991

State of Utah v. Harry Maestas : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

HARRY MAESTAS,

Defendant-Appellant,

Case No. 14585

BRIEF OF RESPONDENT

Appeal from a jury verdict of guilty of the crime of assault by a prisoner, a felony of the third degree, in the District Court of the Third Judicial District in and for Salt Lake County, State of Utah, the Honorable Peter F. Leary, presiding.

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STATE OF UTAH, :

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-vs-

HARRY MAESTAS, :

Defendant-Appellant. :

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STATEMENT OF THE NATURE OF THE CASE

This case is an appeal from the Third Distiict Court, in which defendant was convicted of the crime of assault by a prisoner, a felony of the third degree

DISPOSITION IN LOWER COURT

Appellant was tried on a two count information alleging that he committed the crimes of aggravated sexual assault and assault by a prisoner. Appellant was convicted by a jury of assault by a prisoner and was acquitted of aggravated sexual assault.

RELIEF SOUGHT ON APPEAL

Respondent asks that the jury verdict, and sentence imposed pursuant thereto, be affirmed.

STATEMENT OF FACTS

At the trial, Michael William Hart, convicted of first degree arson and second degree murder, testified that on January 15, 1976, he was a prisoner at the Utah State Prison, incarcerated in "C" section of the maximum security facility. He further testified as follows: Upon leaving his job in the prison kitchen around 5:00 p.m. on January 15, 1976, he returned to his cell, stopping off at the lieutenant's office to pick up come commissary order forms (T. 14). Upon reaching his cell area, he proceeded to his individual cell, walked back out and gave some commissary forms to the defendant Harry Maestas, who was sitting on a table watching T.V. with another cellmate, Edward Cornish. He then proceeded to give some of the slips to Cornish, place some on another cellmate's bed (Myron Lance), then return to his cell and place the remainder on his desk. (T. 17). Hart then walked out of his cell, heading towards the table the T.V. was on, looking for a bucket to use for washing (T. 17). As Hart turned around to ask Maestas or Cornish if either

knew where the bucket was, he (Hart) was hit by Maestas. Hart was then pushed into his cell by Maestas and Cornish, where they struck him several more times, telling Hart that they were tired of being harassed by him about the commissary (T. 18-19). Conversation then occurred between Hart and Maestas (T. 19-20). Hart was then beaten again by Maestas (T. 20).

Other medical testimony confirmed that Hart had received lacerations and bruises (T. 92,99).

Testimony by Sergeant Ken Miles of the Salt Lake County Sheriff's Office revealed a statement made to him by the appellant Maestas to the effect that he (Maestas) "nailed" Hart because Hart was "driving" on him about money owed to Hart by Maestas (T. 126-128).

Appellant Maestas admits striking Hart four or five times because he claimed he heard Cornish yell "Watch out", and because Hart allegedly "came on" Maestas real fast (T. 218-219). On cross-examination, Maestas admitted hitting Hart because he (Hart) was "driving" on Maestas about the commissary (T. 244).

Cornish's testimony followed pretty much the same outline as that of Maestas, although Cornish claims he did not see the blows themselves, only the results therefrom (T. 195).

It seems apparent that the jury believed that portion of Hart's testimony relating the incident, at least beyond a reasonable doubt, since a guilty verdict of assault by a prisoner was returned (T. 321).

Appellant Maestas, who testified in this case, has been convicted of second degree murder, manslaughter, armed robbery and burglary (T. 214).

ARGUMENT

POINT I

THE TRIAL COURT'S REFUSAL TO ALLOW DEFENSE COUNSEL TO CROSS-EXAMINE THE WITNESS HART CONCERNING AGREEMENTS WITH THE STATE IN RETURN FOR HIS TESTIMONY DID NOT DENY APPELLANT HIS RIGHT TO DUE PROCESS OF LAW.

Appellant contends that the trial judge refused to allow defense counsel to bring out the nature of the State's agreement with the victim (William Hart) in return for his testimony, and this refusal was prejudicial to appellant. A thorough reading of the transcript reveals no evidence whatsoever of any agreement between Hart and the State of Utah regarding favors for Hart in return for his testimony. Thus it would seem that appellant is being rather presumptuous in assuming that any agreement existed, when in fact there is no evidence to indicate any agreement whatsoever.

Appellant cites several cases which reinforce the axiomatic principle that cross-examination of witnesses is fundamental to preserve the constitutional right of confrontation of witnesses. Respondent does not take issue with appellant as to this constitutionally protected right, nor is issue taken in regards to the use of cross examination to expose possible motives of a witness for testifying. This was expressed by the Utah Supreme Court in State v. Smelser, 23 Utah 2d 347 463 P.2d 562 (1970) where the court quoted from respondent's brief in a footnote:

> "Cross examination is a matter of right. . . it . . . may be designed to expose the motives of the witness for testifying as he did on direct examination; and that such exposure properly goes to the credibility of . . . [his] . . . direct testimony. Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931)."

It seems, however, that appellant has not grasped the concept that cross-examination is not a "fishing expedition", nor is it unlimited, lying at the whimsical disposal of either defense counsel or the prosecutor, to be used when and in whatever manner either may see fit. The extent of cross-examination is a matter which lies within the sound discretion of the trial judge, State v. Anderson, 27 Utah 2d 276, 495 P.2d 804 (1972),

and this exercise of discretion will ordinarily not be interfered with by the Supreme Court unless there is an abuse of discretion to the prejudice of the defendant. State v. Belwood, 27 Utah 2d 214, 494 P.2d 519 (1972); State v. Robinson, 24 Wash. 2d 909, 167 P.2d 986 (1946).

Cross examination on motives or bias of witnesses may be curtailed, without necessarily being prejudicial. People v. Currey, 97 Cal. App.2d 537, 218 P.2d 153 (1950). American Jurisprudence gives an excellent summary as to when and for what reasons cross examination as to motives for testifying may be restricted in 81 Am. Jur. 2d § 560, pp. 561, 563-564:

> "In criminal cases, it is widely recognized that counsel for the accused has the right to cross-examine witnesses for the prosecution for the purpose of showing their motives in testifying and that considerable latitude in such respect should be allowed.
>
> On the other hand, it lies within the sound discretion of the trial court to determine the propriety of such cross-examination, and abuse of that discretion must be shown in order to constitute prejudicial error. The denial or restriction of cross-examination as to the motive of a witness for the prosecution has been held proper, or at least not prejudically erroneous, when the questions asked were repetitious; when the cross-examination sought to bring out speculative matter; where the matter sought to be elicited had been brought out in evidence previously or subsequently adduced."

In the case at hand, review of the transcript (T. 60-61) reveals that the questions asked by appellant's counsel on cross-examination of William Hart as to whether or not he had negotiated with the State in return for his testimony were repetitious, speculative, and had already been answered on cross-examination by Hart. When being questioned by appellant's counsel on cross-examination, the following colloquy between Hart and Mr. Keller (appellant's counsel) took place:

> "Mr. Keller: Isn't it true that you made up this story so you could get out of the maximum security unit of the Utah State Prison?
>
> Mr. Hart: No Sir.
>
> Mr. Keller: You have never told anyone that you wanted to get out of maximum security unit?
>
> Mr. Hart: Sir, I have said I wanted to get out.
>
> Mr. Keller: And you would do it any way you could?
>
> Mr. Hart: No Sir. (T. 33)."

Further cross-examination of Hart by appellant's counsel resulted in the following colloquy:

> Mr. Keller: I see, you testified at the preliminary hearing in this matter that you knew, well before this incident on January 15th that you had better get out of maximum security didn't you?

Mr. Hart: No Sir.

Mr. Keller: You didn't?

Mr. Hart: No Sir.

Mr. Keller: But you were concerned about staying in maximum security at Utah State Prison?

Mr. Hart: No Sir, I was not.

Mr. Keller: Because of other incidents you were involved in?

Mr. Hart: No Sir.

Mr. Keller: In fact you wanted out of there Mr. Hart?

Mr. Hart: I would have liked to got out, yes.

Mr. Keller: Yes? You are not afraid to admit that you wanted out of maximum security?

Mr. Hart: Yes Sir. (T. 59)."

Sergeant Ken Miles of the Salt Lake County Sheriff's Office was cross-examined by appellant's counsel in regards to an interview that Sergeant Miles had with the victim Michael Hart. The following colloquy ensued:

"Mr. Keller: . . . . Well, after Mr. Hart talked with you did you indicate to him that you would take any steps to see that there were no repercussions from him making these allegations?

Sergeant Miles: I told him that the only choice I had was to present the case to the county attorney and in the event there is a criminal complaint issued then it is between the sheriff and the warden of the prison to make arrangements for his care.

Mr. Keller: He did demand of you certain conditions before he made a statement didn't he? Did he detective Miles?

Sergeant Miles: I would say no.

Mr. Keller: Didn't he tell you he wanted out of the Utah State Prison, he wanted to be transferred to another prison?

Sergeant Miles: No. (T. 140-141)."

Appellant alleges in his brief that there apparently was an agreement between the State and Mr. Hart that if Mr. Hart testified for the State, he would not be sent back to Utah State Prison, but would remain incarcerated in one of the local jails. The above colloquies most definitely negate the allegations of appellant as to the existence of any such agreement. Appellant's counsel, however, not receiving the answer he was seeking, continued to "fish" for answers which would substantiate his allegations and further his client's cause. The following colloquy is the subject of this particular point of the appeal:

"Mr. Keller: And as a result of your testimony in this case the State has agreed to not send you back to the Utah State Prison, haven't they?

Mr. Stott: I'm going to object.

Court: Sustained.

Mr. Keller: Your Honor.

Court: Objection is sustained.

Mr. Keller: I would like to argue that point, Your Honor, may we do so outside the presence of the jury?

Court: Ask your next question.

Mr. Keller: May we at least approach the bench on it?

Court: Ask your next question counsel, please.

Mr. Keller: What other agreement did you make with the State of Utah for your testimony, Mr. - - -

Mr. Stott: I'm going to object to that, there isn't any evidence, he is assuming things.

Court: Objection is sustained.

Mr. Keller: Your Honor, we are entitled to know what agreements have been made with this man in return for his testimony against the defendants. There is a long line of case law that allows us to do that.

Court: Ask your next question counsel. (T. 60-61)."

Certainly the objection to Mr. Keller's question was sustained on the grounds of repetition. Mr. Hart had already answered this question in the negative. Perhaps counsel for appellant continued to ask this question due to his disbelief of Mr. Hart's answer. If so, the trial judge was correct in restricting

further cross-examination. In People v. Clay, 27 Ill. 2d 87 187 N.E.2d 719 (1963), a witness for the prosecution stated she had not been paid to act as an informer, whereupon defense counsel stated "In other words, you do it for the good of the country, is that correct?" The objection to the question was sustained. The court said:

> "The question appears to be rehetorical and shows counsel's disbelief in the witnesses previous answer that she was not paid to be an informant."

Sustaining of the objection was held not to be restricting of cross-examination.

A similar situation existed in People v. Bliss, 76 Ill. 2d 232, 222 N.E.2d 57 (1966). There a witness for the prosecution had disclosed that a charge against her for possession of narcotics had been dropped. Defense counsel continued on cross-examination to further inquire as to promises by police to dismiss such charges. The court sustained objections to further questions on cross-examination as being repetitious and superfluous. This was held not to be improper limiting of cross-examination.

There is a long line of cases upholding the aforementioned principle that limiting of cross-examination where the questions are repetitious will be sustained and will not be held to prejudice the defendant. State v.

White, 146 Mont. 226, 405 P.2d 761 (1965); People v. Micelo, 101 Cal. App. 2d 643, 226 P.2d 14 (1951); People v. Warren, 175 Cal. App. 2d 233, 346 P.2d 64 (1959).

Since there is no evidence that any agreement exists between Hart and the State, appellant's allegation is speculative at best. In State v. Knapp, 14 Wash. App. 101, 540 P.2d 898 (1975), the court held that it is not error for the trial court to limit or reject cross-examination where the circumstances only remotely tend to show bias or prejudice of the witness, where the evidence is vague, or where the evidence is merely argumentative and speculative.

It should be pointed out that the nature of the question asked by Mr. Keller carried with it an implication that perhaps an agreement did exist between Hart and the State, and the jury would certainly have been aware of defense counsel's objections in asking the question. Such was the case in State v. Chance, 279 N.C. 643, 185 S.E.2d 227 (1971). An objection to a question whether or not an accomplice's attorney told him he would get help on his parole in return for his testimony was sustained. No abuse of discretion was found. The court said there was no showing that the verdict was influenced, and that the question itself carried full implication to the jury of any contention suggested.

Finally, the question should perhaps be asked "Would the answering of further questions by Mr. Hart have further aided the jury when he had already given his answers?" If not, then restricting or curtailment of cross-examination is not error. People v. French, 75 Ill. 2d 453, 220 N.E.2d 635 (1966). In the case at hand, it seems doubtful that allowing Hart to answer further questions from appellant's counsel on cross-examination would have further aided the jury in determining credibility or weight to be given to Hart's testimony.

The latest Utah case on the subject of restricting cross-examination when attempting to show bias is State v. Smelser, infra. There the Supreme Court of Utah held that the trial court's refusal to permit cross-examination of a prosecution witness to raise an implication that the witness, who was in jail with the defendant, was testifying in order to gain favors such as a quicker release from jail, may have been error, but if so, was not prejudicial to the defendant. It should be noted that the court in Smelser did not, as appellant says, declare the trial court committed error in refusing to permit cross-examination of the witness, but merely declared that error may have been committed. Even so, it was not prejudicial.

In conclusion, several points should be noted. First, any possible arrangement between Hart and the State in return for his testimony was denied by Hart when he said his motive for testifying was not for the purpose of gaining release from maximum security or the Utah State Prison. Hart was not fabricating a story concerning his beating, since there was corroborating evidence that Hart had been beaten. Second, there is not evidence of any agreement between Hart and the State other than appellant's counsel's allegations and speculations. Third, the jury was apprised of any implications or suspicions when Hart answered the "accusing" questions the first and second times they were asked, and even the third time when the objection to the question was sustained.

It would seem that the trial judge's decision to sustain the objection was based on repetition or speculation. No abuse of discretion to the prejudice of appellant can be found. The trial court's decision should be left to stand. There is no showing that the jury's verdict would have been or could have been different.

POINT II

THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY WITH REGARD TO SELF-DEFENSE DID NOT DENY APPELLANT HIS RIGHT TO DUE PROCESS OF LAW.

Appellant submitted a self-defense instruction (R. 74 1/2) which was refused by the trial court for the reason that there was no substantive evidence to warrant giving of the instruction. A review of the evidence contained in the transcript will reveal that the trial judge was correct in his ruling.

A. The Evidence.

On cross-examination the victim William Hart was asked whether or not it was true that the reason Harry Maestas hit him was because he (Hart) came up behind Maestas' back and jabbed his finger into his back. Hart answered no, that this was not the reason (T. 32-33). Further cross-examination reveals the sequence of events as described by Hart:

> "Mr. Keller: Okay, when you walked out of your cell with the commissary slips you walked directly over to where Mr. Maestas was sitting?
>
> Mr. Hart: Yes Sir.
>
> Mr. Keller: And at that time you came up directly behind his back, did you not?
>
> Mr. Hart: No, I came to his side.
>
> Mr. Keller: His side?
>
> Mr. Hart: Yes Sir.

Mr. Keller: And with your finger you punched him in the shoulder like that, didn't you?

Mr. Hart: No Sir.

Mr. Keller: You didn't?

Mr. Hart: No Sir.

Mr. Keller: You deny that?

Mr. Hart: Yes Sir.

Mr. Keller: Okay, it was at that point that Harry twirled and hit you in the face right?

Mr. Hart: No Sir.

Mr. Keller: What happened then?

Mr. Hart: After I gave the slips to Harry I walked over and gave some to Cornish and walked over and placed some on Myron Lance's bunk and returned to my cell with the remainder.

Mr. Keller: And what did you do?

Mr. Hart: Then I walked out to find the wash bucket which had been underneath the table prior to that.

Mr. Keller: I see, did you ask Harry where that wash bucket was?

Mr. Hart: I was turning to do so at the time I was struck.

Mr. Keller: Where was the wash bucket?

Mr. Hart: I don't know, I didn't see it.

Mr. Keller: You never saw it? What did you want the wash bucket for?

Mr. Hart: To wash out an apron that I wore in the kitchen.

Mr. Keller: To wash out an apron that you wore? Okay. And it is your testimony then

that it was at this point when you were over here in this bench area that Mr. Maestas hit you?

Mr. Hart: I was over on the left hand side of the bench.

Mr. Keller: Behind Mr. Maestas?

Mr. Hart: No in front of him, towards - -

Mr. Keller: In front of him?

Mr. Hart: Right, in that area, yes sir.

Mr. Keller: And you turned to talk to him?

Mr. Hart: Yes Sir.

Mr. Keller: Your back was to him?

Mr. Hart: My side, my back.

Mr. Keller: And just for no reason, just out of the blue he just hauled off and hit you?

Mr. Hart: Yes.

Mr. Keller: That is your testimony?

Mr. Hart: Yes Sir." (T. 40-42).

Other testimony by Hart disclosed that he had no idea why Maestas hit him (T. 44), nor did he recall Maestas making a statement to the effect "Look, don't come up on my back like that. I'm sorry I hit you." (T. 56).

A very important piece of evidence is the testimony that Maestas owed Hart money (T. 37).

Testimony by third parties refute any theory of self defense. Dr. Austin testified that he observed abrasions, several bruises, and lacerations on Hart, which would very strongly indicate that several punches were thrown on Hart (T. 99), as would the swollen hands of Maestas.(T. 108).

Sergeant William Johnstun testified that Harry Maestas told him that he had hit Hart because Hart had made some smart remark to him, and he (Maestas) had lost his temper and hit him. (T. 109).

Sergeant Ken Miles took a statement from Harry Maestas, and related the contents of that statement during the trial. During the statement Maestas told Sergeant Miles that he (Maestas) had hit Hart because Hart "was driving on him" about money owed to Hart by Maestas (T. 126-128). Maestas never made any mention to Sergeant Miles about Hart poking him (Maestas) with his finger before being struck. Maestas also admitted that he owed Hart money, and that he had struck Hart four or fives more times after the initial blow (T. 127).

Testimony by appellant's witnesses did not aid his theory of self-defense. Edward Cornish testified that he did not see Maestas hit Hart (T. 205), when just

prior to that statement he testified he saw Hart get hit by Harry (T. 204-205). At best, we have appellant's witness contradicting himself. Appellant's other witness, Myron Lance, testified that he really didn't know what went on or what occurred (T. 191).

Finally, we have appellant's testimony. We have already seen where appellant has told Sergeant Johnstun that he hit Hart because he (Maestas) had lost his temper over a smart remark allegedly made by Hart, while telling Sergeant Miles that he (Maestas) nailed Hart because he (Hart) was driving on him about some money owed to Hart by Maestas. It should be noted that this subject of money had been discussed by Maestas and Cornish prior to Maestas beating up Hart (T. 127-128). Appellant also testified that he hit Hart because he (Hart) had sneaked up to him (T. 220), and yet he tries to justify why he told Sergeant Johnstun and Sergeant Miles a different reason for the beating while being cross-examined (T. 228).

At best, what we have is a defendant with multiple felony convictions giving different people different versions and reasons as to why he beat up Hart. One reason is because Maestas owed Hart money.

Another is because Hart made a smart remark and Maestas lost his temper. Another is because Hart allegedly "poked" his finger on Maestas' chest, while yet another is because Hart "slapped" Maestas' arm with some commissary slips. Finally, we have Maestas saying that he had no reason to believe that Hart was going to hurt him, other than Maestas' belief that Hart was coming up on him too fast (T. 236). Maestas' reply to the question as to why he kept hitting Hart time after time when he could have stopped after the first couple of hits and asked why he (Hart) came up on him so fast was that he (Maestas) wanted to make sure he (Hart) couldn't hurt him (T. 236).

There was no evidence of self-defense for the jury to consider. What we have is an attempt by appellant's counsel to "inject" words into the witnesses' mouths which would give credence to his theory of "self-defense".

B. The Law.

Certainly the defendant in any criminal case is entitled to have his theory of the case submitted to the jury by appropriate instructions if such a theory is supported by competent and substantial evidence.

This has been the law in Utah for many years and remains so at the present time, having been reaffirmed by the Utah Supreme Court many times. State v. Newton, 105 Utah 561, 144 P.2d 290 (1943); State v. Johnson, 112 Utah 130, 185 P.2d 738 (1947); State v. Castillo, 23 Utah 2d 70, 457 P.2d 618 (1969); State v. Gillam, 23 Utah 2d 372, 463 P.2d 811 (1970); State v. Jackson, 528 P.2d 145,

The question then to be answered is whether or not there exists in the case at hand substantial evidence with which to support appellant's claim of self-defense. A look at the Castillo case answers that question in the negative. In Castillo, the defendant barged into his former wife's house armed with a knife, anticipating trouble. His sole basis for apprehension was his observation of a stick under the couch on a previous occasion. There was there, as here, several versions of what happened. The prosecution's version claimed that defendant was met at the door by his ex-wife's brother, who defendant claimed had a stick. Defendant's ex-wife was then summoned by her brother to hurry and phone a cab, at which time defendant came at the brother with a knife. The ex-wife interceded and grabbed the knife. Defendant then wrenched the knife away and stabbed her. She ran, and as she left she observed the defendant advancing towards

her brother with the knife. She heard the sound of a stick breaking, then a struggle between her brother and the defendant ensued with her brother being stabbed. The defendant's version claimed that the brother hit him (defendant) from behind with a stick, knocking the defendant to the floor. The defendant then came at the brother with a knife. There is then no further recollection of what happened by the defendant.

In refusing defendant's request for a self-defense instruction, holding that there was not substantial evidence to support such a theory, the court said:

> "In State v. Johnson, the court observed that in those cases where a request for instructions on defendant's theory was sustained, defendant's evidence established a state of facts which, if believed by the jury, established adequate provocation, lawful acts on the part of the defendant, or other aggravating facts.
>
> If the defendant's evidence, although in material conflict with the State's proof, be such that the jury may entertain a reasonable doubt as to whether or not he acted in self-defense, he is entitled to have the jury instructed fully and clearly on the law of self-defense. Conversely, if all reasonable men must conclude that the evidence is so slight as to be incapable of raising a reasonable doubt in the jury's mind as to whether a defendant accused of a crime acted in

> self-defense, tendered instructions thereon are properly refused."

No evidence in the case at hand can be found which would raise a reasonable doubt in the jury's mind as to whether or not Maestas acted in self-defense. In fact, no evidence can be found to indicate that any unlawful force, as required by Utah Code Ann. § 76-2-402, (1953), as amended, was used against Maestas at all. Did Maestas reasonably believe that unlawful force was about to be used against him? Certainly the evidence does not indicate so.

As was so well put by the court in Castillo, in quoting from State v. Talavico, 57 Utah 229, 234, 193 P. 860, 861 (1920), what we have in the case at hand is the following situation:

> "While the theory of counsel, persistently and strenuously urged, was that of self-defense, it was nevertheless all theory and no evidence, all shadow and no substance."

We have at the very worst, if defendant's final version is believed, a case of Hart touching Maestas on the arm with commissary slips, subsequently being stricken severely four of five times for "coming up on him (Maestas) too fast." What we really have, however, is a case of Maestas owing Hart some money,

Hart asking when he can expect payment, and Hart subsequently being severely beaten up for no apparent reason other than he was "driving on" Maestas and his nerves. This is admitted by appellant himself in one of his versions of his ever-changing story.

It is clear that the trial judge could not see any evidence, substantive or not, of unlawful force which was used against the appellant. An instruction on self-defense would therefore have been improper. This the trial judge decided as a matter of law, and rightly so.

CONCLUSION

For the reasons heretofore mentioned, respondent respectfully requests this Court to affirm the conviction and subsequent sentence.

Respectfully submitted,

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